

DEPARTMENT OF DEFENSE BLOGGERS ROUNDTABLE WITH NAVY CAPTAIN  
PATRICK NEHER, DIRECTOR OF INTERNATIONAL AND OPERATIONAL LAW, OFFICE  
OF THE JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE NAVY; COAST GUARD  
CAPTAIN CHARLES MICHEL, CHIEF OF MARITIME AND INTERNATIONAL LAW FOR  
THE U.S. COAST GUARD HEADQUARTERS VIA TELECONFERENCE SUBJECT: THE  
LAW OF THE SEA CONVENTION DATE: MONDAY, DECEMBER 10, 2007

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CHARLES "JACK" HOLT (chief, New Media Operations, OASD  
PA): With us on the line, we've got Captain Patrick Neher, who is  
the director of the International and Operational Law in the  
Office of the Judge Advocate General for the Department of the  
Navy, and also Captain Charles Michel, who is the U.S. Coast Guard  
chief of Maritime and International Law for the U.S. Coast Guard  
headquarters here in Washington, D.C.

And who's joining us right now?

Q Marvin Hutchens.

MR. HOLT: Okay, Marvin. Gentlemen, thank you very much  
for being on the Bloggers Roundtable and taking the time to talk  
with us this morning -- this afternoon, excuse me. So do you have  
an opening statement for us, sir?

CAPT. NEHER: Hi, Jack. This is Pat Neher. I do have  
just a couple of things I'd like to say, and then I'd also like to  
make a commitment to your bloggers there online that Chuck Michel  
and I have agreed that we'll stay on this line for as long as  
you'll pay for it, Jack. So even though it's originally set for  
30 minutes, I'm wiping my schedule clean for the rest of the

afternoon. I mean, my commitment to the folks who are on this call is to answer any and all of their questions on the convention. And I think Chuck Michel is making the same commitment. Okay?

MR. HOLT: All right, sir. Thank you very much.

CAPT. NEHER: All right. I'm going to have a couple of remarks here on the national security case for the Law of the Sea Convention. And we begin by stating that we are at war. The president, his war cabinet, the Joint Chiefs of Staff, the commandant of the Coast Guard, every former living CNO, every former living Coast Guard commandant, and numerous former national security officials -- Colin Powell, James Baker, et cetera -- have asked the United States Senate to provide its advice and consent to the '82 convention and the '94 agreement formally modifying the deep seabed provisions.

And the reason they've done that is because the convention enhances our national security. It codifies navigation rights and freedoms that are essential for the global mobility of our armed forces and the sustainment of our combat troops overseas.

There are eight specific benefits I'm going to rip through right now for you. And if you have questions, we can go over it in detail during the rest of the afternoon. But here's what this convention gives us that prior law did not.

First, it sets a 12-mile limit to the breadth of a territorial sea. That has long been an objective of the United States, and we had failed to achieve it in the '58 convention.

Second, this convention provides an exhaustive definition of the right of innocent passage, which is the right of surface ships to transit through foreign territorial seas free from interference from the coastal states.

Third, it creates a right of archipelagic sea lanes passage through archipelagic nations like Indonesia that allows us to go through those island nations in a normal mode of operation, which is very important.

Next, it allows us to lay and maintain submarine cables for communication, free from interference. Next, it added -- it defined and added to what's called the right of approach and visit. This is the right of warships to stop vessels, commercial

vessels, on the high seas and make sure that they're not doing anything illegal. And what this convention provides us is a right to do that if we have reason to believe that the vessel is stateless. The '58 High Seas Convention did not include that. It's especially important for us in the Central Command AOR, because it's used quite often as the basis for vessel stops.

Then the last two here are the most important. This convention established a right of transit passage through international straits overlapped by territorial seas and the approaches to those straits. The right of transit passage allows us to overfly, go on the surface and go through submerged through those straits and the approaches to those straits. This is exceptionally important. It's one of what we refer to as the two crown jewels of the convention.

The other is the right to exercise high seas freedoms in foreign exclusive economic zones. This is very important, because about 40 percent of the world's oceans are comprised in exclusive economic zones, these belts of water that go from 12 miles where the territorial sea ends out to 200 miles; basically what we refer to as littorals.

And that's where the future battle for oceans law and policy is going to be fought. The convention, this convention, makes clear that coastal states have resource rights in the EEZ but they don't enjoy sovereignty. By contrast, the international community enjoys high seas freedoms in the EEZ. That means we can conduct military exercises, et cetera, and we can do so free from coastal state interference. The battle that's now underway is coastal states trying to turn EEZs into territorial seas.

Our non-party status is hurting us. And I'm going to give you seven examples.

First, it denies us a seat at the table when the 155 parties to the convention either interpret or try to amend the convention and tinker with the rights and freedoms I just described to you.

Secondly, it denies us the use of an important enforcement tool against foreign coastal state encroachment; namely, binding dispute resolution. We can talk about that a little more in the time remaining.

Third, it hinders us in our efforts to expand the list of countries that participate in the Proliferation Security Initiative.

Fourth, it creates a seam between us and our coalition partners.

Fifth, it forces us to rely on the vagaries of customary international law as the basis for our navigation rights and freedoms. Sixth -- this is kind of getting into the State Department lane here, but since we don't have a State Department rep here, I want to get this out on the table. Sixth, it denies us the opportunity to submit a claim for our own extended continental shelf off Alaska and elsewhere and (in gaining ?) legal certainty for what has the potential to be vast energy resources.

And seventh, it denies U.S. companies access to deep seabed mining sites, which by definition are beyond national jurisdiction.

On our website, which you should have already through the invitation to this blog, I've posted a detailed myths paper. There are eight that I've counted so far, national security myths out there. And I go through those in detail. I won't repeat them here in the intro, but hopefully through the questions we can get into some of those myths.

Most of the arguments I've heard from opponents and all of the arguments I've heard from opponents on national security grounds are misplaced. They simply are inaccurate.

I'm going to hand it over to Chuck before we start with the questions.

CAPT. MICHEL: Hi. Good afternoon. This is Chuck Michel. I'm the chief of Maritime International Law for the Coast Guard. I just want to take a few minutes and tell you why becoming a party to the Law of the Sea Convention will help the Coast Guard do its many missions.

First of all, I want to echo what Pat said about the criticality of ensuring our navigation rights are solidified around the world. Coast Guard cutters, if you don't know, actually deploy around the world, not only in the Western Hemisphere, but we're also over in the Persian Gulf.

We rely on those exact same rights that the Navy uses to move around the world, and those need to be codified and solidified in treaty law and not based on customary international law, the direction of which, really, in reality, is being set by these 155 parties to this convention. We need to sign up for the Law of the Sea Convention and codify those rights in treaty law.

Signing the convention would also provide a solid legal foundation for carrying out a number of the Coast Guard's law enforcement and homeland security functions, specifically in counterdrug, migrant interdiction, fisheries protection and pollution prevention.

As stated by Pat, the Coast Guard relies often on the right of visit in counterdrug cases, dealing with stateless vessels. A lot of the drug traffickers actually try to hide using stateless vessels from the application of international law. And signing on to the convention would actually codify our right to take care of those vessels regularly. It also codifies other important rights like hot pursuit.

In addition, it provides us with the ability to establish and maintain a contiguous zone out to 24 nautical miles. We use this zone on a daily basis, currently based on customary international law, to interdict migrants trying to come into the United States, particularly from Cuba and the Dominican Republic, as well as Haiti and the Bahamas. And it would be much better to have this on a good, solid legal foundation for us to make those type of migrant interdiction cases.

In addition, the convention establishes the exclusive economic zone which is used to protect the nation's fisheries resources. Again, putting that on a solid legal foundation would be of great benefit to protecting our natural resources.

In addition, as Pat mentioned, the '82 convention stabilizes the outer limit of the territorial sea at 12 nautical miles. The Coast Guard regularly encounters, particularly down in the South American region, countries with excessive territorial sea claims. These claims, some of which go out to 200 nautical miles from the base line, interfere with our law enforcement operations regularly. And we need to have the ability to roll back those claims.

Currently, in our negotiations with those countries, they say that they're not going to negotiate with us because we're not even parties to the Law of the Sea Convention, so how can we

complain about their excessive territorial claims? And in reality, that's a pretty good argument. We need the ability to roll those claims back to 12 nautical miles to prevent further interference with our law enforcement activities in the Western Hemisphere and otherwise.

I guess the bottom line here is that we think that becoming parties to the convention will make us more effective at doing our job, better protect our sailors and better protect our nation. The convention is a good deal, and we need to take it and we need to codify those important rights in the most solid foundation that we can, and that's treaty law.

Thank you.

MR. HOLT: All right, gentlemen, thank you very much.

And first on the line, Commander Salamander, why don't you get us started?

Q Oh, thank you very much.

And Captains, good afternoon. Thank you for the opportunity. CAPT. NEHER: Thank you.

Q Yes, sirs, one quick question. Back in 2003, now the chairman of the Joint Chiefs, Admiral Mullen, stated that he had a concern that there could be an impact on the operational planning and activities in our security with that treaty. Is that statement accurate? And if it's so, what are we doing to mitigate that?

CAPT. NEHER: Yeah, I think I know the reference you're making. And, no, it's not accurate. Admiral Mullen is a strong proponent of the convention, for the reasons I've laid out. He was asked a hypothetical question about what would he be concerned if there was a possibility that a -- (inaudible) -- an arbitral panel interfered with our operations. And it was a hypothetical question, and he gave an answer.

Now, the issue, though, of dispute resolution is very important. It's worth addressing here for a minute, because I've been asked that very same hypothetical by opponents; like Mr. Gaffney, for example, when I debated him in public, insisted that despite the language of the convention, we would find ourselves in the crosshairs of an international court. And it's important, I think, to look at the convention itself and see what it says. And

there are -- so I'm going to just take a minute of your time here and walk you through the arbitration process.

There is mandatory dispute resolution. In fact, the United States was one of the strong proponents of having a peaceful dispute settlement process during the negotiation. We also, however, wanted to completely and preemptively shield our military activities from dispute resolution, and we succeeded in both counts.

And the way dispute resolution exemptions work is under Article 298, subparagraph 1 of the convention, it provides that a state may completely reject all the dispute resolution procedures, all of them, for three categories of disputes. The first is maritime boundary disputes. The second is disputes involving military activities or certain law enforcement activities, and the third is matters before the United Nations Security Council. The president has asked the Senate, when it ratifies this, to go ahead and declare all three of those exemptions.

Now, there is dispute resolution for categories of disputes that have not been exempted. And the procedures are set out in Part 15, section two of the convention. And under Article 287, it says that a state party may elect the choice of forum. You have four choices. You can choose the World Court, and we're not going to go there. You can choose the international tribunal for the Law of the Sea, and we're not going to go there. Or you can choose arbitration, what the convention refers to as arbitral tribunals. That's what we're going to pick. And there are two flavors. We are going to choose what's called special arbitration for all the categories that that qualifies for. And then, for the remaining balance, we're going to choose what's called arbitration section -- or, pardon me, annex seven arbitration.

So what I'm -- the reason I explained that all out to you was so that you know that the hypothetical question that was asked to Admiral Mullen back in '03 was really kind of unfair. There is no possibility, none whatsoever, that any opposing state, international court or arbitral panel can assert jurisdiction over the United States for any activity that we say is a military activity. And that's just under the black letter of the convention itself.

CAPT. MICHEL: And if I could add one fine point on that. Pat's -- I'm in 100 percent agreement with what he said. We've gotten the question before that military activities are exempted, but a tribunal could make a determination as to what is

or is not a military activity. If you focus on the language of the convention, specifically Article 299, paragraph number one, it specifically says, for those type of exempted activities, you cannot even engage the procedures for dispute resolution without the agreement of the parties.

And that was put there exactly to prevent this second-guessing of what is or isn't one of the exempted activities, to include military activity. So if you focus on the language of the convention, it specifically doesn't allow that type of second-guessing of what those activities are.

CAPT. NEHER: Does that answer your question?

Q Perfect. Thank you very much.

CAPT. NEHER: Okay.

MR. HOLT: Okay. And Jason.

Q Good morning. I'm interested in your application of the convention to the Proliferation Security Initiative in particular. I saw your myth paper, which is very fine and very well-written as to the different parts of the convention. And you have this case of the North Korean ship carrying nuclear materials to Iran.

My question is, does the convention say, for instance, that in international waters that it might be prohibited from boarding the ship, but you wait until it gets into the territorial waters? Is there some kind of limitation on the PSI that would kind of limit you to certain cases?

CAPT. NEHER: No. Let me answer that. I'll put it in the context of the myths paper, because the way the -- this is not your question, so I'm not putting words in your mouth, but I just want to make sure everybody understands, who may not be as smart on this as you are, how the question is usually posed. Usually it's posed in terms of the convention is a constraint; it will limit our interdiction authorities. And as a result, PSI will suffer if we become a party to the convention. That's usually how it's couched.

Now, you haven't done that, so I will answer your specific question, which is, how does the convention address the interdiction authorities, and does it give you a menu where you wait till it leaves the high seas to get into the territorial



seas, et cetera? And the short answer is the convention recognizes that there are interdiction authorities that exist outside the convention itself. And then the convention adds to those in a couple of areas.

So if you read Article 110, which is the right of approach and visit, for example, the introductory clause to 110 says that except for powers that derive from treaty, a warship is not justified in interfering with a ship on the high seas unless one of four situations occur. And then it just rattles them off. You know, it's unauthorized broadcasting, slave trade, stateless vessel.

The argument goes, "Ah, you've only got four, so therefore you'll be limited." No, the key part of 110 is that introductory clause, which says, "except for powers derived by treaty." That means that we retain our right to do interdictions pursuant to self-defense. It means we retain our right to do boardings pursuant to flag-state consent, pursuant to port-state control measures, pursuant to security regimes we get implemented through the International Maritime Organization, pursuant to United Nations Security Council resolutions.

And the way this actually works is we do this for -- my office actually does this full-time in support of the combatant commanders -- is for particular operations, we build interdiction matrices that list all the authorities and all the ways that we can assert our authority.

Now, let's apply that to the PSI. The Proliferation Security Initiative was started in -- I believe it was May of 2003. And in October, the original 11 founding nations agreed to principles. And since that time, we've moved from 11 to 88 countries in support today. And those founding principles require that interdictions be conducted in accordance with national legal authorities and consistent with international law, including this convention.

So we do interdictions under PSI in accordance with international law and the respective national legal authorities of all the PSI participants. And what that means is that you can have your cake and eat it too. You can use all your interdiction authorities that would be applicable to the high seas environment, and you can gain all the interdiction authorities that the individual PSI participants would have through their national authorities.

So I can do an interdiction, for example, of, say, a -- well, I guess the best example would be the motor vessel (BVC China ?), which broke the back of the Libyan WMD program. It was a PSI interdiction. We had the U.K., the Italians and the Germans all cooperating with the United States, and we diverted the vessel and then boarded it and seized the stuff that we expected to find.

And that was a combination of querying a vessel on the high seas under high seas authorities, then working with the flag state under its flag-state legal authority over the vessel to get it diverted to a coastal state, where the coastal state authorities were then able to use their national legal authorities to do the boarding and seize the bad stuff.

So it's -- the way that you need to look at this convention is it's a bedrock legal instrument for maintaining public order on the world's oceans, and it complements all the other legal authorities that exist out there. And you have to approach it in that comprehensive manner and make sure that you exercise all the authorities you have available to you.

I'm going to turn it over to Chuck. Chuck does this for a living, not just PSI. The Coast Guard, as you know, has a huge role in PSI, but also in counternarcotics and some of the other law enforcement interdictions that kind of overlap a little bit.

CAPT. MICHEL: Yeah, it's actually a very similar problem to what you have in PSI that the Coast Guard deals with on a daily basis, and that's the ability to get on board a foreign flag vessel on the high seas. And we do it every day. We do it through a -- just like Pat said, we use the Law of the Sea Convention -- (inaudible) -- our law as customary international law.

We would like to see that as treaty law, but as customary international law, added on top of the many bilateral agreements and ad hoc arrangements that we have with other flag states. So it's a very similar problem, and we work around it through these various agreements and mechanisms. And what we'd like to see is we'd like to see the Law of the Sea Convention stabilized and put into treaty law, because that is, like Pat said, the underlying bedrock foundation for these procedures. So we think it would be very helpful to become parties in that regard.

It would also be very helpful, because we have to actually go in and prosecute these cases in federal court. And we

had on occasion federal courts question reasons why we're doing things in accordance with customary international law rather than treaty law. And we'd like to avoid those questions once and for all by becoming parties to this document.

CAPT. NEHER: And one real quick add-on on PSI. Not being a party is hurting us. We're trying to expand beyond '88. We've got a couple of very important countries in the Pacific, Indonesia and Malaysia, who have signaled to us directly that the U.S. non-party status makes it very difficult for them to convince their legislatures to support their participation in PSI. It comes down to a question of confidence and trust. And they need to be able to convince their respective democratic political institutions that the United States is sincere when it says that PSI will be conducted in accordance with international law.

Next question, I guess.

Q Sure. If I could just quickly summarize, so you're saying PSI itself is not a treaty, but it uses other established treaties and conventions to intercept weapons of mass destruction, and the convention does not block any of the existing treaties, and therefore not the PSI either.

CAPT. NEHER: Exactly.

Q Got it. Thank you very much.

MR. HOLT: Okay. And Brian -- Brian Jordan.

Q If you could give me a couple of real-world examples of how not being signatories to this has hurt U.S. interests.

CAPT. NEHER: Sure. I just gave you one.

Q All right.

CAPT. NEHER: No kidding. Indonesia and Malaysia aren't going to join PSI unless we join this convention. And then we're going to have to -- even after that, we're going to have to work with them to get them to fully embrace PSI.

But another example are the extended continental shelf and the deep seabed mining. Now, on the extended continental shelf, there was a lot of press when the Russians went ahead and planted their titanium flag on the North Pole, and there were

worries and all that and a lot of speculation that the Russians were engaging in a publicity stunt. And there might have been some of that to what the Russians were doing.

But more importantly, the Russians were perfecting the claim they submitted in 2001 to gain extended continental shelf, their continent, into the Arctic. And we are the only Arctic nation that is not a party to this convention. And as a result, we are the only Arctic nation that can't take advantage of the provisions in the convention which allow a coastal state to gain legal certainty for an extended continental shelf. And we think our continental shelf off Alaska extends about 600 miles, so we're talking about a lot of seabed that we would have access to. We can't get that legal certainty that's required to attract capital to exploit the resources on that shelf so long as we stay outside the convention.

The other example is the deep seabed. Now, by definition, the deep seabed is those areas of the seabed beyond national jurisdiction, what the convention refers to as "The Area." U.S. companies will not be able to compete for deep seabed mining if the United States stays outside this convention. There's just no way around it.

Now, on the bigger issue of real-world examples specific to national security, I'll tell you what keeps me up at night, other than my age, and that is there is -- this is what I referred to as this battle over the future direction of oceans law and policy.

If you take a country like Australia, there's an important international strait that Australia borders with Papua New Guinea. It's called the Torres Strait. And Australia has illegally, improperly, asserted a regulatory right over vessels engaged in transit, passage, through that international strait.

Australia is trying to unilaterally impose a compulsory piloted regime, which means nobody can pass through that strait without taking on board an Australia pilot. And Australia says, "If you do this without my pilot, next time you come into my country, I arrest you and your vessel."

So this is pretty serious stuff. We, for example, don't want countries that straddle straits to pick up and follow Australia's lead, because it's contrary to the convention. And there is nothing more important to the security of the United States and our economic prosperity than to ensure that these

critical choke points remain free from coastal-state interference and regulatory control.

Well, we're not going to roll the Seventh Fleet into Sydney Harbor to compel the Australians to roll back their illegal regime. It's just not going to happen.

Q No regime change in Australia, huh?

CAPT. NEHER: Yeah. I mean, we've got Australia Special Forces guys shoulder to shoulder with our folks in Afghanistan right now. In the Northern Arabian Gulf, you've got Australian ships doing OIF missions right now. This is a close ally. We're not going to use force or the threat of force to try to ensure that Australia doesn't set bad law.

But what we could do, if we were a party to the convention, is we could use the peaceful dispute resolution process to bring our case against Australia. And we are very confident that if we did that, we would win. And I'm even more confident. I think that as soon as we brought the case, Australia, on its own, would then cave and roll back its regulation, because it doesn't want to lose in arbitration.

Q Very good.

CAPT. MICHEL: If I can jump in here, I'll give you another real- world example similar to the Australian one, but this one's actually closer to home. And I was working on this one this morning.

If you aren't aware, the ambassador of Canada wrote to the Federal Energy Regulatory Commission regarding northern Maine, the Head Harbour Passage, which leads into actual U.S. ports in northern Maine. But you have to actually go through Canadian waters in order to get there.

The ambassador to Canada wrote a communication to the Federal Energy Regulatory Commission, or FERC, saying that they are going to prohibit the entrance of liquefied natural gas ships into northern New England. If you aren't familiar with the natural gas shortage in the Northeast that exists, it's real and it impacts Americans.

And Canadians -- the government of Canada at the highest level -- and the prime minister has said this -- has said, "We will prohibit liquefied natural gas carriers coming into the

United States to service U.S. facilities," a right which we have as codified in the convention. And they've said that at the highest levels.

The only thing that we've got working in our tool kit right now is soft diplomacy, which hasn't worked. My understanding is President Bush has personally communicated with the prime minister, who blew off President Bush and said no, because he's playing to his local political constituency, or the use of force against Canada, which I think is highly unlikely we're going to do that.

So without being -- they're a party to the Law of the Sea Convention. We're not. Without being a party to the Law of the Sea Convention, we cannot avail ourselves of the dispute resolution provisions. And just like in Torres Straits, as Pat described, this is a slam dunk. We would win. There's absolutely no question about it.

Right now U.S. citizens are likely going to end up paying more for their natural gas and probably have less of it because of our inability to become a party to the Law of the Sea Convention. I don't know how much closer to home that can hit.

Q Who answered that question just there?

CAPT. MICHEL: Captain Michel.

Q Thank you very much.

Q Sorry. What was that strait again? What was the strait up in northern Maine? I've got my map open here. CAPT. MICHEL: It's called Head Harbours Passage. It goes through -- past Maquatie (sp) Bay, around Campobello Island, and then into the northern ports there. And we actually have three liquefied natural gas facilities that are trying to build there, and the only thing that's really holding them up at this point is the Canadian government intransigence.

MR. HOLT: And Andrew, you're next.

Q Yeah, gentlemen, Andrew Lubin from -- (inaudible) -  
- Military Observer.

I actually have a very simple question here. Why -- well, actually, I've got a couple, so you're going to (stand in line ?) for a while. I'll start with an easy one. Why do we need

this codified? I mean, part of international law is based on -- (inaudible) -- old- time practices and procedures. If everybody accepts it, it's kind of the law. So why don't we just kind of go along with it?

CAPT. NEHER: We've been answering that a little bit here as we've gone along. The real problem is -- well, first of all, a couple of things. And from the specific rights that are in the convention itself, not everybody has gone along with it. There isn't --

Q But let me interrupt. But if everybody -- and I haven't done international relations for too long a period of time. If everybody agreed to 200 miles for the EEZs, don't we get the same deal? It can't be just the people who signed, because we can say, "Hey, you signed it; it's good for us too."

CAPT. NEHER: Yeah, but that's not the issue. The issue isn't can we declare a 200-nautical-mile EEZ. We did. President Reagan did that in March of 1983. The problem is, how will coastal-state rights and authorities be applied within the EEZ? And being outside the convention, we are at a distinct disadvantage in protecting the navigation rights that are codified in the convention.

That's why one of the arguments we make over on the Hill is we need to lock into these rights and freedoms while we can. We would never be able to get the deal that we got in this convention if we had to negotiate it over again today. I mean, this convention tips the balance between coastal-state authority and the navigational rights of the international community in favor of the navigation rights of the international community. That's what we're trying to protect. And it's not -- we're trying to protect it against erosion. It's coastal- state encroachment. So what we're doing and the way I described it to my boss over here is we're dying a death of a thousand cuts by being outside the convention. I mean, life on the planet isn't going to end if we can't take Australia to dispute resolution, but it's going to get real hard if Australia is allowed to enforce its Torres Strait regulation. And then other states that border international straits -- think Iran in the Strait of Hormuz or Oman or Yemen for the Bab al Mandab -- if those states begin to try to do environmental regulatory control in those straits, now we're in a world of hurt.

So, you know, we can recognize this train coming down the track right at us. It's coastal-state encroachment. And we're arguing that we need to lock into this convention.

Now, that's the legal issue, okay? There's a much bigger issue and reason to join this convention from a national security perspective, and this is what the vice chief testified to at the Senate. And this has to do with the fundamental incongruity with being outside this convention and trying to execute our national security strategy.

The March '06 national security strategy is the best document of its kind, in my opinion, for the last 50 years. And what it says is that our strength is not founded upon force of arms alone. It rests on -- and I'm quoting from the president here -- "strong alliances, friendships, international institutions, which enable us to promote freedom, prosperity and peace in common purpose with others."

The Cooperative Strategy for 21st Century Seapower piece that was just published, it says specifically, "Our nation's interests are best served by fostering a peaceful global system comprised of interdependent networks of trade, finance, information, law, people and governance."

Q Can I ask a question? This is Pamela from Atlas Shrugs.

MR. HOLT: Stand by. Let's let the captain finish.

CAPT. NEHER: What I'm saying is, there is a fundamental disconnect between trying to lead an alliance of nations to maintain public order on the world's oceans when you're one of a handful of countries, along with North Korea, Iran, Syria and Libya, that aren't parties to that convention. Are you tracking that?

Q Absolutely. Now let me rephrase it a different way. With the exception of -- because of people like Frank Gaffney and these other moronic American firsters, is there any non-political or non- get-them-re-elected reasons for them to be opposing it?

CAPT. NEHER: Well, I've got to tell you, Mr. Gaffney is a friend of mine, so --



Q I see him on TV all the time, and he wouldn't be one of mine. So this -- (inaudible). I apologize. CAPT. NEHER: Well, I disagree with him on this convention.

Q That's not nice. That's not called for.

CAPT. NEHER: And I've debated him on this convention. But I can't comment on that kind of personal attack on --

Q Okay, then I apologize. Let me just say, then, is there any reason other than getting re-elected for these various American firsters to be opposed to this?

CAPT. NEHER: Yeah. I can't talk politics because I'm in uniform, but --

MR. HOLT: Yes. And, okay, let's move on.

Q Let me rephrase it. Is there any reason other than that? That's what I'm trying to get at. Is there any legitimate reason to be opposing this?

CAPT. NEHER: Well, I think you have to ask them. But I can tell you, now, I've been working this issue for half of my professional life, it seems. And there are different categories of criticism for this convention, in my view. There is -- there are folks that are just misinformed, okay. They know about the defects in the '82 Deep Seabed Mining Convention provisions, the Part 11 on deep seabed mining. But they just don't know how the '94 agreement fixed those.

That's pretty easy to educate people through. Then there's another body of folks who will tell you sort of off-line, "Well, as multilateral treaties go, this one's pretty good. But we don't like multilateral treaties. We have a fundamental disagreement that the United States' best interests are served through multilateral engagement like that."

Now, I understand that perspective. As a member of the uniformed military, I really can't get into that philosophical debate. All I can tell you is, as a member of the uniformed military, the mission that I've been assigned by my commander in chief says I am to embrace international institutions, build alliances and friendships to maintain public order on the world's oceans.

So I'm reporting back to my political masters in the Congress and in the executive branch that there is a disconnect between that mission you've given me and the tools I have at my disposal to execute that mission. There is a deficiency not being a party to this convention. And that's why we're asking the Senate to correct that deficiency.

Q       Okay.

MR. HOLT:   Okay.   And Marv.   Marvin, are you still with us? Okay.   Q       Can I jump in here?   Goldfarb from the Weekly Standard.

MR. HOLT:   Yes, Michael, go ahead.

Q       So is there nothing in this treaty that the Navy finds troubling or that the Navy has any concerns about an impact on military affairs at all?

CAPT. NEHER:   No.   From the national security perspective, we don't find fault with this convention. This kind of is a follow-up to the last question. I think, of all the criticisms I've heard most recently, the one that -- I heard it last week; I was invited to talk to some folks on the Hill, and I think Senator McConnell's statement was accurate, and that is, there is a mandatory dispute resolution process under this convention that can result in arbitration over topics that are not exempted or limited. Under Article 297, there's a whole series of jurisdictional limitations. Then under Article 298 there are the outright exemptions, which include military activities.

Now, for topics that aren't either accepted or limited, there is a possibility of arbitration. And I think -- I'm paraphrasing here, so please don't -- I'm hoping I'm not getting this wrong, but I think Senator McConnell, in his statement, when he announced his opposition, stated that even submitting to that arbitration, in his view, was a surrender of sovereignty that he did not accept.

Now, that's a policy call well above my pay grade. Now, it doesn't concern the national security equities. I think that goes to the other equities, the non-national security equities.

Q       This is Pamela, Atlas Shrugs.

MR. HOLT:   Yes, Pamela, go ahead.

Q Could the U.S. military continue the critical Proliferation Security Initiative, PSI, the Bush administration program led by John Bolton? Could they continue this, which focuses on interdicting chemical, biological and nuclear weapons components on the high seas?

CAPT. NEHER: Absolutely. The PSI founding principles require that interdictions occur in accordance with national legal authorities and consistent with international law. And Undersecretary Bolton testified to that in front of the Senate in 2005. In fact, he went on to testify that he noted that the vast majority of our PSI partners are, in fact, parties to the Law of the Sea Convention. Q But he's not a supporter.

CAPT. NEHER: I know he's not a supporter, but he was when he was in the government. And he testified truthfully about the convention. Now, I can give you another example. We do PSI interdictions all the time or support others. Many of those I can't talk to you about because they're --

Q I understand.

CAPT. NEHER: All right. But there is one that's in the public domain, the interception of the motor vessel (BVC China ?), which broke the back of Libya's weapons-of-mass-destruction program. That was an interdiction that was conducted in accordance with the Law of the Sea Convention.

Q Okay. I think that the reason why you get such a visceral reaction is because it does give the United Nations power over U.S. interests. It does require a transfer of militarily useful, sensitive technologies to other nations. And we're living in a very belligerent world, as much as we all want to get along and love each other. Not everybody feels the same. And, you know, it would give the United Nations that long-sought power of taxation.

CAPT. NEHER: Let me address each of those, because you raised three things there.

Q Okay.

CAPT. NEHER: First, the technology transfer -- ma'am, that's not accurate. There was a mandatory technology transfer provision in the deep seabed mining provisions of the '82 convention. It was rescinded outright in the '94 agreement. There is no requirement to transfer technology. And, in fact, in

-- I think it's Article 302; basically it specifically states that states can refrain from disclosing any information that's contrary to their security interests.

The second is the taxation argument. I don't think that's accurate. I've looked at the convention carefully. I think it's more than just semantics. There are only three ways that I can find that money will change hands under this convention.

The first is if a nation is a party to the convention and it decides to exploit an extended continental margin; that is, continental shelf that extends beyond 200 miles out to the limit. If you do that, under Article 82 of the convention, you have to agree to make royalty payments if the well you've sunk is profitable after five years. You don't pay anything for the first five years. Then you pay 1 percent of the value each year beyond that to 12 years. And then after 12 years, if you're still running the thing, it reverts back to a 7 percent cap. Q It's un-American.

CAPT. NEHER: Those -- well, you say it's un-American, but --

Q That's my feeling. That's all. I feel that international tax is un-American.

CAPT. NEHER: Okay. I just --

Q (Inaudible) -- on the '94 agreement. There is some disagreement on that, because people said it would not fix the '94 agreement and it did not alter the reality of the transfer of sensitive militarily useful --

CAPT. NEHER: Ma'am, hold on for one second. The extended continental margin royalty thing I'm talking about -- you don't have to go to the '94 agreement. That's the royalty schedule that our oil and gas industry wrote into the convention when it was originally negotiated. No kidding -- they wrote it. And you can read the history of the negotiation.

Q Okay.

CAPT. NEHER: Now, the other part of that is, most people aren't aware of this, but under our domestic U.S. law right now -- I feel like Yogi Berra; you can look it up -- you go to Title 30, Section 1401 of U.S. law, and you will find that right now -- in

fact, this predated the convention entering into force by over a decade -- under our domestic law, we, the United States, recognize that minerals beyond national jurisdiction are, quote, "the common heritage of mankind."

And if you read further down in 1401, you'll see that we already anticipate, under our domestic law, that we're going to make payments to an international institution to gain exclusive exploitation rights to those minerals.

And now the last thing was it cedes power to the United Nations.

Q        Yeah.

CAPT. NEHER: Here's my truth-in-lending thing here, because the proponents drive me -- you know, my friends, the proponents, drive me nuts on this point too. They refuse to recognize that there's United Nations in the title of this convention. Well, doggone it, it's the United Nations Convention on the Law of the Sea. It's there. The thing was negotiated under the auspices of the United Nations.

But it does not create or transfer power to the United Nations. The international institutions that are established under this convention, which have been up and running for a decade now, are three: A commission on the limits of the continental shelf, located in New York City; the International Tribunal for the Law of the Sea, located in Hamburg, Germany; and the International Seabed Authority down in Kingston, Jamaica.

Like I say, they've been up and running for about a decade now. They aren't United Nations specialized agencies. They are actually controlled by the state parties to this convention itself.

So the only connection I can see between the United Nations and those institutions is that -- and this is pretty arcane; we're getting into minutiae here -- but the budget of the International Tribunal for the Law of the Sea, which I think it's like \$17 million or 17 million Euros a year, last I looked it up, that budget gets assessed at the Law of the Sea Convention annual meeting in New York City.

The states' parties, 155 of them, get together each year in New York City, and one of the things they have to agree to by consensus is the budget of the court. And then the contribution,

the share of that budget, gets doled out amongst the 155 per the formula for their contributions to the United Nations. So there is a tie there. You know, if you donate 3 percent to the U.N. budget, then you're going to end up paying 3 percent of the 17 million Euros that go into the (IFOS ?) budget.

MR. HOLT: Okay. And anyone else? Is there anyone I haven't called?

Q You called me and I had the phone muted. Sorry.

MR. HOLT: Okay.

Q This is Marvin Hutchens with ThreatsWatch.org.

You've mentioned several times the agreement as modifying the actual convention itself. Is that, in fact, what's happened? Because there are those who say that it wasn't even allowed to be modified at that time in '94.

CAPT. NEHER: Yes. And this gets complex, too, legally, but if you look at the '94 agreement, specifically look at Article 2 of the '94 agreement and it says that it modifies Part 11 on the deep seabed provisions. And then it goes on to say -- it says that it'll be read as a single instrument with the '82 agreement and that where there are -- what's the word I'm looking for? -- if there are differences or inconsistencies between the '94 agreement and the '82 agreement, the '94 agreement trumps. That's right in Article 2 of the '94 agreement.

And, in fact, if you look at the International Seabed Authority in Kingston, Jamaica, you look at -- like I said, it's been up and running now for a while -- they operate under the '94 agreement. They don't operate under just the original '82 agreement. They operate under the convention as modified by the '94 agreement.

Now, the argument that usually gets made is that the '94 agreement doesn't amend the '82 convention. That's accurate. It couldn't amend the '82 agreement. It's a technical international law point, but the '82 agreement had not yet entered force when the '94 agreement was concluded. And therefore, it's not an amendment. It's a modifying, later-in-time agreement, which happens fairly regularly in international law.

And if I could just pile on here a little bit, because this is also important. This gets into the footnote for Ronald

Reagan and the diary and all that. There is an argument that gets made that President Reagan would not support this convention today. And I think that's not accurate when you fairly read President Reagan's statements.

On January 29th, 1982, he issued a detailed statement on the convention. And what he said was, "We object to Part 11 on deep seabed mining," and we will, quote, "seek changes necessary to correct unacceptable elements and achieve a goal of the treaty that" -- and then he listed six specific objections to Part 11. And he concluded that '82 statement by saying, "If, working together, we can find ways to fulfill these key objectives, my administration will support ratification." He then repeated that in the March 1983 Oceans Policy Declaration.

The footnote in the diary -- there's actually three, not just one; there are three footnotes in the diary. And when you read those three in conjunction with the two statements I've just read, and then you look at the actual Rumsfeld-Adelman mission that was conducted in 1983, then you understand that President Reagan supported this convention except for, and properly so, except for the deep seabed mining provisions.

He refused to sign the agreement, because once you sign an agreement, you are obligated to not do anything inconsistent with the object or purpose of the agreement. And that was not our strategy. Our strategy was to prevent the agreement from entering into force, convince others to reject the deep seabed mining provision, and force the international community to come back to us and ask for a renegotiation.

President Reagan -- he (hanged ?) tough, and so did President Bush Sr. And in 1990, after the Cold War was over, the secretary general of the United Nations came back to us and to the United Kingdom and said, "Hey, are you guys still interested in negotiating a new deep seabed mining regime?" And we said yes. And we then worked off of the six specific objections that President Reagan had posited. The U.K. had a couple more. And we negotiated with the U.K. informally with the secretary general, and we managed to get the '94 agreement, which fixed each and every one of those objections. And I don't know if I posted it on our website yet, but it was made part of the Congressional Record in the last Senate Foreign Relations Committee hearing.

There is an outstanding article by Professor Oxman from the University of Miami that actually goes line by line, all the nouns and verbs, line by line -- '82 agreement, here's the

problem; '94 agreement, here's the fix. And if you need a copy of that, I'd be happy to e-mail it to you and get it to you, because it really -- it's nine pages. It's easy to digest. And it definitively addresses the fact that the '94 agreement fixed the '82 deep seabed mining provisions.

MR. HOLT: And, sir, if you've got -- if you can have them e-mail that to me, Jack Holt here at OSD, I will see that the participants here get a copy of that.

CAPT. NEHER: Will do, Jack.

MR. HOLT: All right, sir.

Is there anyone else on line? Anyone else? Okay, any follow-up questions?

Q Yeah, I've got a follow-up.

Captain, Andrew Lubin again from Military Observer.

You've been talking about deep-sea mining. A lot of the problems back in '82 were manganese nodules. If the United States doesn't sign this, are you saying that the banks won't finance American companies for this kind of drilling? Does that mean Europeans will, or they just won't finance it because this is off our shores?

CAPT. NEHER: Well, I guess what I'm saying is the former. U.S. companies won't get access to deep seabed mining minerals if we're not a party to this convention. You've got to remember that the deep seabed, by definition, includes only areas that are beyond national jurisdiction and authority. So we don't have any jurisdiction or authority right now. A U.S. company that wants -- I mean, right now it's still financially prohibitive to try to go get the stuff.

Q I was going to mention that also.

CAPT. NEHER: Yeah. And, you know, in all honesty, I don't know if they're -- I mean, we're talking -- I've been in briefings where you look at the amount of money, the amount of capital that is going to go into one of these sites, it's pretty mind-staggering.

But let's assume for the sake of argument that there are technological advances and it becomes possible to mine these



nodules, or maybe even the methane hydrates, which is the other thing that people are interested in on the deep seabed. Right now a U.S. company that wanted to go out beyond 200 into the deep seabed would not be able -- I mean, I don't think -- and I've talked to industry people -- they don't think they're going to be able to get the capital necessary to do that because they wouldn't have a license or title to those sites.

They wouldn't have -- I mean, who's going to invest when you're on the outside trying to go at it unilaterally, and in the meantime there is this alternative set legal process that creates actual property rights in mining sites and your country won't avail itself of those rights? I mean, do you see it? I don't see a bank --

Q No, I tend to agree.

But to switch gears slightly, would this include deep-sea oil drilling also?

CAPT. NEHER: Yeah.

Q (Inaudible) -- probably \$90, \$100, that might be commercially viable these days.

CAPT. NEHER: But how are you going to get it beyond 200? I mean, I agree with you. Look at our continental slope north of Alaska. It is impressive. We estimate that there are two Californias in terms of square mileage in our extended continental shelf north of Alaska. And we think there are vast energy resources on that shelf.

If we don't have the legal certainty -- in other words, if Russia -- there are all the Arctic nations, Russia, Canada, the United States, Norway and Denmark. Denmark actually represents Greenland, believe it or not. Okay, the other four are parties to the convention. Let's say they all file because they're all in the process of doing this. They file for their extended continental shelves, and the commission makes recommendations. Those states accept those recommendations, and then the limits to their extended continental shelves have now been set.

Under the convention, if a state accepts the recommendations of the commission, that is final and binding. So those guys all have final and binding limits set on their continental shelf. They're going to go out there and explore the oil resources with confidence. We don't.

Q They could conceivably explore off of our continental shelf, then, beyond the 200-mile limit.

CAPT. NEHER: I can't imagine U.S. banks or oil companies securing capital to sink a well beyond 200 miles when --

Q No, but the --

CAPT. NEHER: -- (it's vital ?) to it.

Q No, but the other signees -- you know, the Russians, the Canadians, you know, who've got money coming in hand over fist from commodity and oil prices -- they could. CAPT. NEHER: Yeah. They're going to -- I guarantee you, Russia is going to exploit its extended continental shelf. There's no doubt in my mind.

Q They announced that -- when they sent that submarine -- they've already announced that they're going to.

CAPT. NEHER: Yes. That's why our oil and gas industry is so gung-ho to have the Senate ratify this convention. We are at a competitive disadvantage in an area that is of vital concern to our country.

Q Are we looking at a time limit where the United States has to sign this by a certain time or otherwise we're out of --

CAPT. NEHER: No, but the -- you can sign the convention at any time. But each day that goes by, we're more disadvantaged. The other competing countries have 10 years from the date that they ratify the convention to submit their claims for extended continental shelf. That means that they're all going to have their claims adjudicated here in the not-too-distant future.

CAPT. MICHEL: And I just want to add here, we're losing ground here on a daily basis. I just had a briefing with my commandant of the Coast Guard this morning, and he just came back from the assembly at IMO. And he saw how outside the convention is actually hurting us. He had to deal straight on with the Torres Strait pilotage issue. He had to deal with piracy issues over there, the management of ballast water. And he recognizes that every day the U.S. is losing ground and losing credibility in our engagement with the international partners.

That's why the fallacy of founding our national security interests in customary international law is like building your house on shifting sands. And the direction of the sands are not under the control of the United States, Iraq, Iran, Libya, Syria and these outsider nations. The direction of international law is being set by the 155-plus members of this convention. That direction is occurring every day. So we're losing ground every day out there.

Q When you go to the briefings in the House, what's the response, when you do your Senate briefings? Or are you not able to do that?

CAPT. NEHER: No, we've been -- I've been briefing over on the Hill now for eight, nine months, I guess. And they're very well-received. I've been very impressed with the level of knowledge of the Senate staffers. I've only talked directly to a couple of senators. Mostly I do staff briefings. But I've been very impressed with the level of knowledge in the Senate about this convention.

Q Then why are they not bringing it to a vote? CAPT. NEHER: I think they will. I think they've got other things that are more important right now. But I can't speak for Senator Reid. The committee voted in favor 17-4 on the 31st of October. I expect it to be put on the executive calendar by the Senate majority leader sometime early next year.

MR. HOLT: All right.

Q If you had a vote today, would it pass?

CAPT. NEHER: Yes; no doubt in my mind.

MR. HOLT: All right, excellent discussion, gentlemen. Thank you very much.

Are there any follow-up questions? Anything else out there?

Q None here.

MR. HOLT: All right. Gentlemen, do you have any closing thoughts for us or a closing comment?

CAPT. NEHER: No -- (inaudible) -- that if any of the folks that were blogging and participating in this call have

additional questions for me, please feel free to drop me an e-mail either directly or through Jack. My direct e-mail is Patrick.Neher, N-E-H-E-R, at Navy.mil, M-I-L. And I'm happy to answer your additional questions. I mean, this is important and we need to get it right.

MR. HOLT: All right. And also you can send them to me and I will forward on and we'll make that connection also.

CAPT. MICHEL: Okay. And this is Chuck Michel. I'd like to make the same offer as well. And my e-mail address is Charles.D -- as in "dog" -- .Michel@USCG.mil.

Q Okay. Captain, will you be able to send that one briefing paper over to Jack today or tomorrow morning?

CAPT. NEHER: Yeah. As soon as we get done with this call, I'm going to push it to him.

MR. HOLT: All right. And I will push it out as soon as I get it.

Thank you very much, gentlemen; appreciate you taking the time to visit with us today. And this looks like something we may engage in again in the future, depending on how things go. We appreciate you coming and being on with us.

CAPT. NEHER: Thank you. END.